

No. 91-194

SEP 4 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION, PETITIONER

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, RESPONDENT

On Petition for a Writ of Certiorari to the
Supreme Court of North Dakota

BRIEF OF THE
NATIONAL ASSOCIATION OF RETAIL DRUGGISTS,
INC., NARDA, INC.,
MICHIGAN RETAILERS ASSOCIATION, INC.,
NATIONAL HOME FURNISHINGS ASSOCIATION, INC.,
AND THE PLUNKETT FURNITURE COMPANY,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHARLES ROTHFELD *
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

* *Counsel of Record for the*
Amici Curiae

QUESTION PRESENTED

Whether the Commerce or Due Process Clauses of the United States Constitution preclude a State from requiring an out-of-state seller to collect use taxes on property sold to customers in the State, when the seller regularly solicits in-state but has no physical presence in the jurisdiction.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	3
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
<i>Alan Wood Steel Co. v. School District of Philadelphia</i> , 229 A.2d 881 (Pa. 1967)	11
<i>Asahi Metal Industry Co. v. Superior Court</i> , 480 U.S. 102 (1987)	14
<i>Book-of-the-Month Club, Inc. v. Porterfield</i> , 268 N.E.2d 272 (Ohio 1971)	11
<i>Boswell v. Paramount Television Sales, Inc.</i> , 282 So. 2d 892 (Ala. 1973)	11
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	14, 15
<i>Cally Curtis Co. v. Groppo</i> , 572 A.2d 302 (Conn.), cert. denied, 111 S. Ct. 77 (1990)	11
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	15
<i>Evco v. Jones</i> , 409 U.S. 91 (1972)	3
<i>Freeman v. Hewit</i> , 329 U.S. 249 (1946)	15
<i>Good's Furniture House, Inc. v. Iowa State Board of Tax Review</i> , 382 N.W.2d 145 (Iowa), cert. denied, 479 U.S. 817 (1986)	10, 11
<i>In the Matter of Webber Furniture</i> , 290 N.W.2d 865 (S.D. 1980)	10
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	14, 15
<i>L.L. Bean, Inc. v. Department of Revenue</i> , 516 A.2d 820 (Pa. Commw. Ct. 1986)	11
<i>McKesson Corp. v. Division of Alcoholic Beverages & Tobacco</i> , 110 S. Ct. 2238 (1990)	13
<i>Miller Brothers Co. v. Maryland</i> , 347 U.S. 340 (1954)	10, 15
<i>National Bellas Hess, Inc. v. Department of Revenue</i> , 386 U.S. 753 (1967)	passim
<i>National Geographic Society v. California Board of Equalization</i> , 430 U.S. 551 (1977)	3, 15
<i>Proficient Food Co. v. New Mexico Taxation and Revenue Department</i> , 758 P.2d 806 (N.M. Ct. App. 1988)	11
<i>Rowe-Genereux, Inc. v. Vermont Department of Taxes</i> , 411 A.2d 1345 (Vt. 1980)	10

<i>SFA Folio Collections, Inc. v. Bannon</i> , 585 A.2d 666 (Conn. 1991), cert. denied, 111 S. Ct. 2839 (1991)	10
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977)	14
<i>Spector Motor Service v. O'Connor</i> , 340 U.S. 602 (1951)	15
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	14, 15
Statutes and Regulations:	
N.D. Admin. Code § 81-04.1-01-03.1 (3)	4
N.D. Cent. Code § 57-39.2 (Supp. 1991)	3
N.D. Cent. Code § 57-40.2 (Supp. 1991)	3, 4, 12
Ariz. Rev. Stat. Ann. § 42-1401 (5) (b) (1990)	12
Ark. Stat. Ann. § 26-53-121 (b) (1990)	12
Cal. Rev. & Tax. Code § 6203 (f) (Deering 1991)	12
Colo. Rev. Stat. § 39-26-306 (1990)	12
Conn. Gen. Stat. § 12-407 (12) (g) & (15) (e) (1990)	12
Fla. Stat. § 212.0596 (2) (e) (1990)	12
Ga. Code Ann. § 48-8-2 (3) (H) (1990)	12
Idaho Code § 63-3611 (g) (1990)	12
Ill. Rev. Stat. ch. 120, para. 439.2 (4) (1989)	12
Iowa Code § 422.43 (b) (1989)	12
1990 Kan. Sess. Laws 357 (h)	12
Ky. Rev. Stat. Ann. § 139.340 (c) (Baldwin 1991) ..	12
1990 La. Acts 478, to be codified at La. Rev. Stat. Ann. § 47:301 (4) (k)	12
Mass. Ann. Laws ch. 64H, § 1 (1) (1991)	12
Minn. Stat. § 297A.21 (8) (c) (1990)	12
Miss. Code Ann. § 27-67-3 (j) (1990)	12
Neb. Rev. Stat. § 77-2702 (21) (e) (1989)	12
Nev. Rev. Stat. Ann. § 372.728 (6) (Michie 1989) ..	12
N.J. Stat. Ann. § 54:32B-2 (I) (C) (West 1990)	12
N.M. Stat. Ann. § 7-9-10 (A) (1990)	12
N.Y. Tax Law § 1101 (b) (8) (C) (II) (Consol. 1991)	12
N.C. Gen. Stat. § 105-164.8 (b) (5) (Supp. 1990)	12
Ohio Rev. Code Ann. § 5741.01 (H) (3) (Baldwin 1991)	12
Okla. Stat. tit. 68, § 1354.1 (1990)	12
Pa. Cons. Stat. Ann. § 7201 (b) (3) (Purdon 1989) ..	12

TABLE OF AUTHORITIES—Continued

	Page
R.I. Gen. Laws § 44-18-15(1) (E) (1990)	12
S.C. Code Ann. § 12-36-70(2) (b) (Law. Co-op. 1991)	12
Tenn. Code Ann. § 67-6-102(6) (J) (1990)	12
Tex. Tax Code Ann. § 151.107(a) (5) (Vernon Supp. 1991)	12
Utah Code Ann. § 59-12-102(9) (c) & (17) (b) (1991)	12
Vt. Stat. Ann. tit. 32, § 9701(9) (F) (iii) (1990)	12
Va. Code Ann. § 58.1-612(D) (1991)	12
Wash. Rev. Code § 82.12.040(1) (1990)	12
W. Va. Code § 11-15A-6a (1991)	12
Miscellaneous:	
Advisory Comm'n on Intergovernmental Relations, <i>State and Local Taxation of Out-of-State Mail Order Sales</i> (1986)	7, 8
Douglas, <i>State Officials Determined to Tax Interstate Mail-Order Sales</i> , 47 Tax Notes 1048 (1990)	7, 7-8, 13
Hartman, <i>Collection of the Use Tax on Out-of-State Mail-Order Sales</i> , 39 Vand. L. Rev. 993 (1986)	7
Hellerstein, <i>Significant Sales and Use Tax Developments During the Past Half Century</i> , 39 Vand. L. Rev. 961 (1986)	8
McCray, <i>Commerce Clause Sanctions Against Taxation on Mail-Order Sales: A Re-Evaluation</i> , 17 Urb. Law. 529 (1985)	3
Morse & Zimmerman, <i>Efforts to Collect Sales Tax on Interstate Mail-Order Sales: Recent State Legislation</i> (1990) (prepared for presentation to the National Conference of State Legislatures)	7, 13
Mowen, Wiener, & Young, <i>Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications</i> , 66 J. Retailing 222 (1990)	8
Note, <i>Collecting the Use Tax on Mail-Order Sales</i> , 79 Geo. L.J. 535 (1991)	8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION, PETITIONER

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, RESPONDENT

On Petition for a Writ of Certiorari to the
Supreme Court of North Dakota

BRIEF OF THE
NATIONAL ASSOCIATION OF RETAIL DRUGGISTS,
INC., NARDA, INC.,
MICHIGAN RETAILERS ASSOCIATION, INC.,
NATIONAL HOME FURNISHINGS ASSOCIATION, INC.,
AND THE PLUNKETT FURNITURE COMPANY,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici are businesses and organizations whose members include retailers throughout the United States. They are:

The National Association of Retail Druggists, Inc. A Delaware corporation founded in 1898, the association is a private, non-profit, voluntary organization composed of

STATEMENT

independent retail pharmacists who own approximately 40,000 outlets across the country.

NARDA, Inc. Incorporated in Illinois in 1943, it has approximately 3200 company members who sell and service home appliances and electronic home entertainment products.

The Michigan Retailers Association. Incorporated in Michigan in 1940, its 3000 members operate more than 5000 storefront locations throughout the State. They include a broad range of retail establishments, including clothiers, jewelry stores, shoe stores, toy and gift stores, book stores, tire dealers, and vehicle service shops.

The National Home Furnishings Association, Inc. Incorporated in Illinois, it represents some 3500 company members who operate more than 13,500 home furnishing retail establishments in all 50 States.

The Plunkett Furniture Company. Begun as a business in 1931 and incorporated in 1950, the company maintains eight retail stores in Illinois that sell furniture, draperies, carpeting, and other home furnishings and accessories.

This case presents an issue of enormous importance to *amici*: whether mail order and direct marketing firms are constitutionally immune from state use taxes. Local retailers must collect and remit sales taxes in 45 States and the District of Columbia; such taxes are not imposed on sales made by out-of-state direct marketers. As a consequence, local retailers are placed at an enormous competitive disadvantage by a rule—contended for by petitioners—that also exempts direct marketers from a duty to collect compensating use taxes. *Amici* therefore submit this brief to assist the Court in the resolution of this case.¹

¹ The parties' letters of consent pursuant to Rule 37.2 of the Rules of this Court have been filed with the Clerk of the Court.

1. Like 44 other States and the District of Columbia, North Dakota imposes a tax on receipts from the sale of property within its borders. N.D. Cent. Code § 57-39.2. Like those other States, North Dakota also imposes a so-called compensating use tax on the in-state use of property that was purchased outside the State's taxing jurisdiction. N.D. Cent. Code § 57-40.2. Such use taxes, which are equivalent in amount to the sales tax imposed on in-state purchases of similar property, are designed both to prevent evasion of the sales tax by persons who make purchases out-of-state and to "put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977).²

In theory, the use tax falls upon the consumer who uses the property. As the Court has noted, however, "the impracticability of [the use tax's] collection from the multitude of individual purchasers is obvious." *National Geographic*, 430 U.S. at 555. As a consequence, North Dakota imposes the burden of collecting the tax on all retailers "maintaining a place of business in this state" (N.D. Cent. Code § 57-40.2-07); that term is defined to include not only businesses physically present in the State, but also

every person who engages in regular or systematic solicitation of sales of tangible personal property in

² As a matter of practice, States do not attempt to impose their sales taxes on sales made in the State by direct marketers to out-of-state customers. See *McCray, Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529, 532 (1985). It is an open question whether this practice is constitutionally compelled. See *Evco v. Jones*, 409 U.S. 91, 93 (1972); *McCray, supra*, 17 Urb. Law. at 554-555, 565-567. Virtually all States, including North Dakota, provide credits when sales and use taxes are imposed on the same transaction by different States. See *id.* at 532.

this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.

N.D. Cent. Code § 57-40.2-01(7). The term "regular or systematic solicitation" is administratively defined to mean "three or more separate transmittances of any advertisement or advertisements" during a specified 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3).

2. Petitioner Quill Corporation is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Pet. App. A2. It operates a national direct marketing business selling office supplies and equipment. *Ibid.* Petitioner does not maintain an office in North Dakota, does not send sales or other personnel into the State, and does not advertise through local newspapers or broadcast outlets. *Id.* at A39. Quill does, however, extensively solicit business in North Dakota through the use of catalogs and flyers; each year, it mails more than 60 such publications—involving more than 230,000 separate pieces of mail that, in the aggregate, weigh over 24 tons—to customers in the State. *Id.* at A3. Similarly, Quill licenses a computer software program to its North Dakota customers that permit them direct access to Quill's computer, where they may check inventory, confirm prices, and order merchandise. *Id.* at A29. In addition, Quill solicits customers by telephone and maintains a "help line" for customers to call with questions about its products. *Ibid.* As a consequence of this activity, Quill has several thousand customers and annual sales of just under \$1 million in North Dakota, making it the sixth largest seller of office supplies in the State. *Id.* at A2-A3.

Although it is undisputed that petitioner meets the statutory definition of a "retailer maintaining a place of

business" in the State (see Pet. App. A5), Quill refused to collect the tax on goods purchased for use in North Dakota. See *id.* at A4. It based its position on this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which held unconstitutional under the Due Process and Commerce Clauses of the United States Constitution the imposition of use tax liability on a mail order firm that did not have a physical presence in the taxing State. North Dakota responded by bringing this declaratory judgment action to settle Quill's liability. See Pet. App. A4. The trial court found the State's arguments in favor of the constitutionality of its use tax "quite persuasive" (*id.* at A40), but felt constrained by the decision in *Bellas Hess* to hold the tax unconstitutional as applied to Quill. *Id.* at A42.

The North Dakota Supreme Court reversed. Pet. App. A1-A36. The court premised its holding on the conclusion that *Bellas Hess* is "an obsolescent precedent" (*id.* at A10) and that this Court "would so conclude." *Id.* at A13. The state court began by observing that "[t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists," noting that "'mail order' has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as 'direct marketing.'" *Id.* at A11. The court explained that the volume of mail order sales has grown exponentially (*id.* at A12) and that, as a consequence of changing technology, "[t]oday a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer." *Id.* at A13. The court also found that technological advances in computer and automated accounting systems "have greatly alleviated the administrative burdens created by [a use tax] collection duty." *Id.* at A26.

The court next observed that “the legal landscape [has] been altered in th[e] quarter-century” since *Bellas Hess* was decided. Pet. App. A13 (footnote omitted). The court below explained that, in the intervening period, this Court abandoned the “formalism” that previously had characterized decisions under the Commerce Clause. *Id.* at A14; see *id.* at A15-A19. The state court also noted that this Court has “significantly broadened the closely related Due Process analysis in personal jurisdiction cases” (*id.* at A19), recognizing that “technological advances have made physical presence within the jurisdiction meaningless in modern commerce.” *Id.* at A20. With this in mind, the court below held that “Quill’s asserted lack of physical presence is not fatal to the State’s attempt to require Quill to collect and remit use tax on its sales into North Dakota.” *Id.* at A25. Instead, the court concluded that “the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks.” *Id.* at A25-A26.

Applying this standard here, the court found that Quill’s links to North Dakota—its continuous solicitation of the North Dakota market, lease of computer software to in-state customers, disposal of catalogs in the State, and contacts with North Dakota financial institutions to check credit information—established sufficient nexus to support use tax liability. Pet. App. A28-A35. The court also concluded “that the State provides benefits, services, and opportunities which significantly aid Quill’s business and which are related to the use tax.” *Id.* at A36. It accordingly rejected petitioner’s claims under the Commerce and Due Process Clauses and held that Quill must collect and remit the use tax. *Id.* at A36.

REASONS FOR GRANTING THE PETITION

In the years since *Bellas Hess* was decided, the mail order industry has grown enormously. Indeed, as the court below observed, the term “mail order” has become something of a misnomer; marketers such as Quill use a wide range of technologically advanced solicitation and ordering practices in addition to those historically associated with mail order houses. See Pet. App. A11-A13. As a consequence, more than \$180 billion worth of products were sold by direct marketers in 1989 (see *id.* at A12); between 15% and 25% of all retail sales are now made by mail. See *id.* at A63; Douglas, *State Officials Determined to Tax Interstate Mail-Order Sales*, 47 Tax Notes 1048 (1990); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 Vand. L. Rev. 993, 1008 (1986). Yet under the physical presence rule of *Bellas Hess*, a substantial portion of these transactions are constitutionally immune from state taxation.

Against this background, whether *Bellas Hess* retains its vitality is a matter of exceptional importance both to the administration of state tax laws and to the operation of local economies. Sales and use taxes account for almost 25% of the revenues of state and local governments, with 14 States relying on such levies for more than 40% of their revenues. See Advisory Comm’n on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 6 (1986) (hereinafter cited as “ACIR Report”); Pet. App. A64. The rule of *Bellas Hess* thus digs deeply into the tax bases of state and local governments: the best estimates suggest that the immunity of mail order sales from taxation costs the States between \$2 to \$3 billion a year in tax revenue. See Morse & Zimmerman, *Efforts to Collect Sales Tax on Interstate Mail-Order Sales: Recent State Legislation* 1 (1990) (prepared for presentation to the National Conference of State Legislatures); Douglas, *supra*, 47 Tax

Notes at 1048-1049; Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 538 (1991).

At the same time, of course, the immunity of mail order firms from sales and use taxes gives them a significant competitive advantage over local retailers, who are obligated either to pass the taxes on to their customers or to absorb the levies themselves. This competitive effect is substantial; with state sales taxes now levied at rates ranging from 2% to 7.5%—and with local governments imposing additional sales taxes at rates ranging up to 4.25% (see ACIR Report 23)—the most widely accepted analyses indicate that every 1% increase in a jurisdiction's sales tax may reduce local retail sales by some 6%. Pet. App. A65. See ACIR Report 38-40; Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 J. Retailing 222, 234-235, 238 (1990). This distortion in the market, it seems plain, has no rational economic justification. See ACIR Report 5; Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 982 (1986).

In our view, the conclusion of the court below—that a rule having such untoward consequences is not constitutionally compelled—was entirely correct. We recognize, however, that state courts, legislatures, and taxing authorities have taken widely varying approaches to the issue. And ultimately, of course, it is this Court's prerogative to determine whether its decisions remain good law. We accordingly urge the Court to grant review so that it may definitively settle the question presented here: whether physical presence in the jurisdiction is a necessary prerequisite to the assertion of a State's taxing authority.

1. At the outset, the analysis used by the Court below cannot be reconciled with this Court's holding in *Bellas*

Hess. Petitioner overstates matters by arguing (at Pet. 9) that this case is factually indistinguishable from *Bellas Hess*; advances in technology allow Quill to take advantage of computer contacts, telefax links, and customer service telephone banks that were unknown in 1967. See Pet. App. A13, A29-A30, A35; Pet. 3. But for the most part, the additional contacts here are no different in substance from the links that were held constitutionally inadequate in *Bellas Hess*. In each case, the mail order firm carried on substantial economic activities in the taxing jurisdiction; in each, the firm had an insubstantial physical presence there.

Indeed, while Quill maintains an in-state property interest in computer software that it leases to North Dakota customers (see Pet. App. A29-A31, A35), the court below did not attempt to distinguish *Bellas Hess* on that ground. Instead, it candidly explained that *Bellas Hess* is "an obsolescent precedent" (*id.* at A10), concluding "that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." *Id.* at A13. The court accordingly held that "the concept of nexus encompasses more than mere physical presence within the state" (*id.* at A25), explaining that, "[w]hether or not an out-of-state seller has a physical presence within the State, it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services." *Id.* at A32. That conclusion cannot be squared with the distinction drawn in *Bellas Hess* "between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 386 U.S. at 758. And while that distinction is, in our view, insubstantial, petitioner is correct in suggesting (Pet. 18-19) that this Court ultimately must determine which of its holdings no longer remain good law. Review of the decision below is warranted for that reason alone.

Similarly, the decision below cannot be reconciled with the holdings of other state courts of last resort. Most notably, the Connecticut Supreme Court recently concluded that *Bellas Hess* remains controlling precedent, holding flatly "that some degree of physical presence, whether by the presence of a retail store, offices, local agents, solicitors, or local advertising, is constitutionally required to support" imposition of a duty to collect use tax. *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 674-675 n.12 (Conn. 1991), cert. denied, 111 S. Ct. 2839 (1991). See *id.* at 670, 674-676 (rejecting claim that the *Bellas Hess* standard no longer is controlling). That court accordingly held the levy of such a tax unconstitutional on facts strikingly similar to those at issue here. See *id.* at 669, 671. Indeed, the court below noted and expressly rejected the holding in *SFA Folio*, explaining that it did "not find the reasoning of that case persuasive." Pet. App. A34. Again, this Court should grant review to resolve the conflict.

2. Having said that, it bears emphasis that the decision below is not an idiosyncratic departure from this Court's precedent. Other state courts also have expressed doubts about the vitality of this Court's decisions on the taxation of out-of-state businesses. Several have suggested, for example that this Court "has apparently repudiated" the reasoning of *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), a decision upon which *Bellas Hess* substantially relied. *Rowe-Genereux, Inc. v. Vermont Department of Taxes*, 411 A.2d 1345, 1350 (Vt. 1980). See *Good's Furniture House, Inc. v. Iowa State Board of Tax Review*, 382 N.W.2d 145, 149 (Iowa) (*Miller Brothers* "eroded"), cert. denied, 479 U.S. 817 (1986); *In the Matter of Webber Furniture*, 290 S.W.2d 865, 869 (S.D. 1980) (same).

And perhaps because the law in this area is unsettled, the state courts have reached conflicting conclusions about the relevance under *Bellas Hess* of particular contacts

with the taxing State. Thus the Alabama Supreme Court held that the lease of films by mail permits the imposition of a tax on the out-of-state lessor (*Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 893, 896-897 (Ala. 1973)); on virtually identical facts, the Connecticut Supreme Court found insufficient nexus to tax. *Cally Curtis Co. v. Groppo*, 572 A.2d 302, 303, 306 (Conn.), cert. denied, 111 S. Ct. 77 (1990). One court has held that in-state visits by customer service representatives do not confer jurisdiction to tax (*L.L. Bean, Inc. v. Department of Revenue*, 516 A.2d 820, 823, 825-826 (Pa. Commw. Ct. 1986); cf. *Alan Wood Steel Co. v. School District of Philadelphia*, 229 A.2d 881, 883, 887 (Pa. 1967) (citing *Bellas Hess*, visits by "promotion men" held insufficient to establish nexus under state law)); other courts have held that similar visits support state taxing authority. *Proficient Food Co. v. New Mexico Taxation and Revenue Department*, 758 P.2d 806, 807, 808-809 (N.M. Ct. App. 1988) (visits by customer representatives, telephone solicitation, and in-state deliveries establish nexus). The Ohio Supreme Court held local advertising insufficient to authorize taxation (*Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971)); other courts regard in-state advertising as a significant link. See, e.g., *Good's Furniture*, 382 N.W.2d at 146-147, 150 (advertising and delivery by taxpayer's trucks establish nexus).

In all, the varying approaches taken by the state courts have subjected otherwise similarly situated taxpayers to differing constitutional rules in different States. That disuniformity warrants this Court's attention.

3. In addition, whether *Bellas Hess* remains good law will determine the constitutionality of a very substantial body of state legislation. As doubts about the vitality of the physical presence rule have grown, States have become increasingly assertive in their attempts to exercise taxing authority against mail order firms. At least 21 States have enacted laws that, like North Dakota's, expressly

impose tax liability on direct marketers that regularly solicit business in-state.³ The tax laws of at least 10 other States similarly reach firms that solicit by mail or telephone, so long as those firms also benefit from banking, debt collection, or related activity in the jurisdiction.⁴ The enforceability—and constitutionality—of these laws turns on the status of the *Bellas Hess* rule.

³ See Ariz. Rev. Stat. Ann. § 42-1401(5)(b) (1990); Ark. Stat. Ann. § 26-53-121(b) (1990); Conn. Gen. Stat. § 12-401(12)(g) & (15)(e) (1990); Fla. Stat. § 212.0596(2)(e) (1990); Ga. Code Ann. § 48-8-2(3)(H) (1990); 1990 Kan. Sess. Laws 357(h) (repealing Kan. Stat. Ann. § 79-3702); 1990 La. Acts 478, to be codified at La. Rev. Stat. Ann. § 47:301(4)(k); Mass. Ann. Laws ch. 64H, § 1(1) (1991); Minn. Stat. § 297A.21(8)(c) (1990); Miss. Code Ann. § 27-67-3(j) (1990); N.J. Stat. Ann. § 54:32B-2(I)(C) (West 1990); N.C. Gen. Stat. § 105-164.8(b)(5) (Supp. 1990); N.D. Cent. Code § 57-40.2-01(6) (Supp. 1991); Okla. Stat. tit. 68, § 1354.1 (1990); Pa. Cons. Stat. Ann. § 7201(b)(3) (Purdon 1989); R.I. Gen. Laws § 44-18-15(1)(E) (1990); S.C. Code Ann. § 12-36-70(2)(b) (Law. Co-op. 1991); Tenn. Code Ann. § 67-6-102(6)(J) (1990); Utah Code Ann. § 59-12-102(9)(c) & (17)(b) (1991); Vt. Stat. Ann. tit. 32, § 9701(9)(F)(iii) (1990). While New Mexico's statute does not expressly hinge liability to collect the use tax on enumerated direct marketing activities, it imposes liability on retailers "attempting to exploit New Mexico's markets." N.M. Stat. Ann. § 7-9-10(A) (1990).

⁴ Cal. Rev. & Tax. Code § 6203(f) (Deering 1991); Idaho Code § 63-3611(g) (1990); Ill. Rev. Stat. ch. 120, para. 439.2(4) (1989); Iowa Code § 422.43(b) (1989); Ky. Rev. Stat. Ann. § 139.340(c) (Baldwin 1991); Neb. Stat. § 77-2702(21)(e) (1989); Nev. Rev. Stat. Ann. § 372.728(6) (Michie 1989); Ohio Rev. Code Ann. § 5741.01(H)(3) (Baldwin 1991); Tex. Tax Code Ann. § 151.107(a)(5) (Vernon Supp. 1991); W. Va. Code § 11-15A-6a (1991). Four additional States authorize the imposition of use tax liability on direct marketers to the extent permitted by the United States Constitution, or if permitted by Congress or this Court. See Colo. Rev. Stat. § 39-26-306 (1990) (if authorized by federal legislation); N.Y. Tax Law § 1101(b)(8)(C)(II) (Consol. 1991) (to extent permitted by Constitution); Va. Code Ann. § 58.1-612(D) (1991) (to extent allowed by federal law or this Court); Wash. Rev. Code § 82.12.040(1) (1990) (to extent permitted by Constitution).

In the meanwhile, uncertainty about *Bellas Hess* has led state officials to take wildly inconsistent approaches in their assertion of this new state taxing authority. While some state revenue officers have not attempted to enforce their laws against mail order firms, at least 17 States are (with varying degrees of vigor) endeavoring to collect use taxes from direct marketers. See Morse & Zimmerman, *supra*, at 3-4, 10; Douglas, *supra*, 47 Tax Notes at 1048. Conversely, a number of mail order firms, uncertain about the status of the law and unwilling either to engage in the expense of litigation or to run the risk of accumulating large back tax liabilities, are complying with the laws voluntarily. See Morse & Zimmerman, *supra*, at 3-12.

As a result, either some States are foregoing legitimate opportunities to tax or some taxpayers are paying unconstitutional levies. In either case, it would be appropriate for this Court to settle the confusion that has led to unfair (and possibly unconstitutional) disuniformities across the nation. And, in our view, the Court should intervene sooner rather than later; because some States are now asserting their taxing authority, the general obligation to refund unconstitutionally collected taxes (see *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990)) means that any future reaffirmation of *Bellas Hess* may have a dramatically disruptive effect on state treasuries.

4. Finally, it should be added that, as the court below persuasively demonstrated, *Bellas Hess* cannot be reconciled with this Court's more recent holdings. The *Bellas Hess* Court derived its rule from earlier decisions under the Due Process and Commerce Clauses. The rule was controversial from its inception: Justice Fortas, writing for three Members of the Court, had "no doubt" at the time that "large-scale, systematic, continuous solicitation and exploitation of the [in-state] consumer market is a sufficient 'nexus'" to support tax liability. 386 U.S. at

761 (Fortas, J., dissenting). And in the intervening years, both props underlying the *Bellas Hess* decision have been substantially undercut.

So far as due process is concerned, the Court has made clear in the related context of personal jurisdiction that a State's authority

may not be avoided merely because the defendant did not *physically* enter the forum State. * * * [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (emphasis in original). See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109-110 (1987) (plurality opinion); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980).

Under these precedents, North Dakota courts plainly could assert jurisdiction over Quill if, for example, an in-state purchaser brought suit because he was injured by one of the products that Quill shipped into the State. See *Burger King*, 471 U.S. at 473; Pet. App. A24. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on Quill arising out of the same transaction. To the contrary, the Court held in the leading case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer v. Heitner*, 433 U.S. 186, 203 (1977))—that due

process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The activities which establish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *id.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 561 (1977); *Miller Brothers*, 347 U.S. at 345.

As for the Commerce Clause, *Bellas Hess* based its restrictive nexus holding principally on *Freeman v. Hewit*, 329 U.S. 249 (1946), which invalidated a levy imposed on receipts from interstate sales "because it tax[e]d the very process of interstate commerce." *Id.* at 253; see *id.* at 255-256. See *Bellas Hess*, 386 U.S. at 756; *id.* at 759 ("it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved"). As the Court subsequently has explained, however, decisions such as *Freeman* and *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), "reflect[] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 (1977) (footnote omitted). This approach, the Court continued, was "viewed in the community as a triumph of formalism over substance." *Id.* at 281. In *Complete Auto*, which reformulated and rationalized Commerce Clause jurisprudence, the Court accordingly overruled *Spector* and disapproved the *Freeman* rule. *Id.* at 288-289. And with the support of *Freeman* removed, *Bellas Hess* must be viewed as an exceedingly shaky precedent.

In these circumstances, a decision that has been stripped of its doctrinal underpinnings remains on the books as

an impediment to legitimate state taxing authority and an obstacle to properly functioning local markets. And the tension in this Court's decisions inevitably will exacerbate the conflict among state courts and the disuniformities in the approaches taken by state taxing authorities. Further review therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES ROTHFELD *
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

* *Counsel of Record for the*
Amici Curiae

SEPTEMBER 1991